

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PATRICK MURPHY,

Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner of
Social Security,

Defendant.

Case No. 3:09-cv-05619-KLS

ORDER REVERSING DEFENDANT'S
DECISION TO DENY BENEFITS AND
REMANDING FOR FURTHER
ADMINISTRATIVE PROCEEDINGS

Plaintiff has brought this matter for judicial review of defendant's denial of his applications for disability insurance and supplemental security income ("SSI") benefits. This matter has been referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule MJR 4(a)(4) and as authorized by Mathews, Secretary of H.E.W. v. Weber, 423 U.S. 261 (1976). After reviewing the parties' briefs and the remaining record, the Court hereby finds that for the reasons set forth below defendant's decision to deny benefits should be reversed, and this matter should be remanded thereto to conduct further administrative proceedings.

FACTUAL AND PROCEDURAL HISTORY

On February 26, 2003, plaintiff filed applications for disability insurance and SSI benefits, alleging disability as of January 1, 1999, due to severe back pain and spasms, as well as

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1 an inability to stand, walk, bend, sit or sleep a full night. Tr. 18, 66-68, 70-72, 89. Both
2 applications were denied upon initial administrative review and on reconsideration thereof. Tr.
3 18, 37, 40, 48, 857. A hearing was held before an administrative law judge (“ALJ”) on March
4 19, 2007, at which plaintiff, represented by counsel, appeared and testified, as did a vocational
5 expert. Tr. 859-902.

6
7 On June 21, 2007, the ALJ issued a decision, in which she determined plaintiff to be not
8 disabled. Tr. 18-30. Plaintiff’s request for review of the ALJ’s decision was denied by the
9 Appeals Council on August 11, 2009, making the ALJ’s decision defendant’s final decision. Tr.
10 8; 20 C.F.R. § 404.981, § 416.1481. On October 5, 2009, plaintiff filed a complaint in this Court
11 seeking judicial review of the ALJ’s decision. See (ECF #1). The administrative record was
12 filed with the Court on December 16, 2009. See (ECF #10). The parties have completed their
13 briefing, and thus this matter is now ripe for review and a decision by the Court.

14
15 Plaintiff argues the ALJ’s decision should be reversed and remanded to defendant for an
16 outright award of benefits, because the ALJ erred in: (1) evaluating the medical evidence in the
17 record; (2) finding that none of his impairments met or medically equaled a listed impairment;
18 (3) assessing his credibility; (4) evaluating the lay witness evidence in the record; and (4) finding
19 him to be able to return to his past relevant work. Plaintiff further argues evidence in the record
20 supports a finding that he is incapable of performing other jobs existing in significant numbers in
21 the national economy and thus disabled on that basis as well. Defendant agrees the ALJ erred in
22 evaluating the medical and lay witness evidence in the record, and therefore in finding plaintiff
23 to be not disabled, but argues this matter should be remanded for the purpose of conducting
24 further administrative proceedings. For the reasons set forth below, the Court agrees that while
25 the ALJ erred in finding plaintiff to be not disabled, this matter should be remanded to defendant
26

1 to conduct further administrative proceedings.

2 DISCUSSION

3 This Court must uphold the Commissioner's determination that plaintiff is not disabled if
 4 the proper legal standard was applied and there is substantial evidence in the record as a whole to
 5 support the decision. See Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986). Substantial
 6 evidence is such relevant evidence as a reasonable mind might accept as adequate to support a
 7 conclusion. See Richardson v. Perales, 402 U.S. 389, 401 (1971); Fife v. Heckler, 767 F.2d
 8 1427, 1429 (9th Cir. 1985). It is more than a scintilla but less than a preponderance. See
 9 Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975); Carr v. Sullivan, 772 F.
 10 Supp. 522, 524-25 (E.D. Wash. 1991). If the evidence admits of more than one rational
 11 interpretation, the Court must uphold defendant's decision. See Allen v. Heckler, 749 F.2d 577,
 12 579 (9th Cir. 1984).

13 I. The ALJ's Evaluation of the Medical Evidence in the Record

14 The ALJ is responsible for determining credibility and resolving ambiguities and
 15 conflicts in the medical evidence. See Reddick v. Chater, 157 F.3d 715, 722 (9th Cir. 1998).
 16 Where the medical evidence in the record is not conclusive, "questions of credibility and
 17 resolution of conflicts" are solely the functions of the ALJ. Sample v. Schweiker, 694 F.2d 639,
 18 642 (9th Cir. 1982). In such cases, "the ALJ's conclusion must be upheld." Morgan v.
 19 Commissioner of the Social Sec. Admin., 169 F.3d 595, 601 (9th Cir. 1999). Determining
 20 whether inconsistencies in the medical evidence "are material (or are in fact inconsistencies at
 21 all) and whether certain factors are relevant to discount" the opinions of medical experts "falls
 22 within this responsibility." Id. at 603.

23 In resolving questions of credibility and conflicts in the evidence, an ALJ's findings

1 “must be supported by specific, cogent reasons.” Reddick, 157 F.3d at 725. The ALJ can do this
2 “by setting out a detailed and thorough summary of the facts and conflicting clinical evidence,
3 stating his interpretation thereof, and making findings.” Id. The ALJ also may draw inferences
4 “logically flowing from the evidence.” Sample, 694 F.2d at 642. Further, the Court itself may
5 draw “specific and legitimate inferences from the ALJ’s opinion.” Magallanes v. Bowen, 881
6 F.2d 747, 755, (9th Cir. 1989).

7
8 The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted
9 opinion of either a treating or examining physician. Lester v. Chater, 81 F.3d 821, 830 (9th Cir.
10 1996). Even when a treating or examining physician’s opinion is contradicted, that opinion “can
11 only be rejected for specific and legitimate reasons that are supported by substantial evidence in
12 the record.” Id. at 830-31. However, the ALJ “need not discuss *all* evidence presented” to him
13 or her, but rather must only explain why “significant probative evidence has been rejected.”
14 Vincent on Behalf of Vincent v. Heckler, 739 F.3d 1393, 1394-95 (9th Cir. 1984) (citation
15 omitted) (emphasis in original); see also Cotter v. Harris, 642 F.2d 700, 706-07 (3rd Cir. 1981);
16 Garfield v. Schweiker, 732 F.2d 605, 610 (7th Cir. 1984).

17
18 In general, more weight is given to a treating physician’s opinion than to the opinions of
19 those who do not treat the claimant. See Lester, 81 F.3d at 830. On the other hand, an ALJ need
20 not accept the opinion of a treating physician, “if that opinion is brief, conclusory, and
21 inadequately supported by clinical findings” or “by the record as a whole.” Batson v.
22 Commissioner of Social Sec. Admin., 359 F.3d 1190, 1195 (9th Cir. 2004); see also Thomas v.
23 Barnhart, 278 F.3d 947, 957 (9th Cir. 2002); Tonapetyan v. Halter, 242 F.3d 1144, 1149 (9th Cir.
24 2001). An examining physician’s opinion is “entitled to greater weight than the opinion of a
25 nonexamining physician.” Lester, 81 F.3d at 830-31. A non-examining physician’s opinion may
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1 constitute substantial evidence if “it is consistent with other independent evidence in the record.”
2 Id. at 830-31; see also Tonapetyan, 242 F.3d at 1149.

3 A. Dr. Pahlke

4 Plaintiff and defendant agree the ALJ failed to provide legally sufficient reasons for not
5 adopting the mental functional limitations assessed by Carol A. Pahlke, Ph.D. With respect to
6 Dr. Pahlke, the ALJ found in relevant part as follows:
7

8 . . . Carol A. Pahlke, Ph.D., treated the claimant . . . on two occasions:
9 between June 30, 2003, and September 15, 2003 (Exhibit 21F: 14 – 20), and
10 again between August 21, 2006, and January 23, 2007 (Exhibit 21F: 2 – 13).
Interestingly, although she diagnosed the claimant with depression and PTSD,
she never offered an opinion concerning his functionality.

11 Tr. 26. As both parties point out, however, Dr. Pahlke did provide such an opinion in a mental
12 impairment questionnaire she completed in late February 2007, in which she found plaintiff to be
13 unable to perform a number of functional tasks and activities, gave him a global assessment of
14 functioning (“GAF”) score of 40,¹ stated he would be “[u]nable to work due to [his] experience
15 of physical pain,” and assessed him as being markedly restricted in his activities of daily living,
16 as having moderate difficulties in maintaining social functioning and extreme difficulties in
17 maintaining concentration, persistence or pace, and as having experienced repeated episodes of
18 extended decompensation. Tr. 803-08.
19

20 Because such limitations likely would have a significant impact on plaintiff’s ability to
21 perform work-related activities, Dr. Pahlke’s assessment thereof constitutes significant probative
22 evidence the ALJ was required to consider. The ALJ’s failure to do so, therefore, was improper.
23

24 ¹ A GAF score is “a subjective determination based on a scale of 100 to 1 of ‘the [mental health] clinician’s
25 judgment of [a claimant’s] overall level of functioning.’” Pisciotta v. Astrue, 500 F.3d 1074, 1076 n.1 (10th Cir.
26 2007). It is “relevant evidence” of the claimant’s ability to function mentally. England v. Astrue, 490 F.3d 1017,
1023, n.8 (8th Cir. 2007). “A GAF score of 31-40 is extremely low, and ‘indicates . . . major impairment in several
areas, such as work or school, family relations, judgment, thinking, or mood.’” Salazar v. Barnhart, 468 F.3d 615,
624 n.4 (10th Cir. 2006) (quoting Diagnostic and Statistical Manual of Mental Disorders (Text Revision 4th ed.
2000) at 32).

1 Plaintiff argues Dr. Pahlke's assessment supports a determination that he is disabled at step three
 2 of the sequential disability evaluation process.² Not all of the medical opinion source evidence
 3 in the record, though, supports the level of impairment noted by Dr. Pahlke, including that from
 4 Lolita Velmer, M.D., discussed below, although Dr. Velmer did assess a similar GAF score. See
 5 Tr. 318-22, 329-47, 350-53, 508-21.

6
 7 The issue of whether any of plaintiff's mental impairments meets or medically equals a
 8 listed impairment, therefore, is one much more appropriately addressed by defendant on remand.
 9 Plaintiff argues as well that the ALJ erred in failing to include in his residual functional capacity
 10 assessment any of Dr. Pahlke's mental functional limitations.³ See Tr. 22 (limiting plaintiff only
 11 to performing simple, routine, repetitive work, requiring only occasional general public contact).
 12 The Court agrees that given the ALJ's error in failing to discuss Dr. Pahlke's mental functional
 13 assessment, it is not at all clear the ALJ's assessment of plaintiff's RFC is completely accurate.
 14 For example, Dr. Pahlke found plaintiff would be unable to maintain regular attendance and be
 15 punctual within customary tolerances or complete a normal workday and workweek without any
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17
 18 ² Defendant employs a five-step "sequential evaluation process" to determine whether a claimant is disabled. See 20
 19 C.F.R. § 404.1520; 20 C.F.R. § 416.920. If the claimant is found disabled or not disabled at any particular step, the
 20 disability determination is made at that step, and the sequential evaluation process ends. See id. At step three of that
 21 process, the ALJ must evaluate the claimant's impairments to see if they meet or medically equal any of the those
 22 listed in 20 C.F. R. Part 404, Subpart P, Appendix 1 (the "Listings"). See 20 C.F.R § 404.1520(d), § 416.920(d); see
 23 also Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999). If so, the claimant is deemed disabled. Id. The burden
 24 of proof is on the claimant, however, to establish he or she meets or medically equals any of the impairments in the
 25 Listings. Tackett, 180 F.3d at 1098. "A generalized assertion of functional problems," furthermore, "is not enough to
 26 establish disability at step three." Id. at 1100 (citing 20 C.F.R. § 404.1526).

³ If a disability determination "cannot be made on the basis of medical factors alone at step three of the [sequential
 disability] evaluation process," the ALJ must identify the claimant's "functional limitations and restrictions" and
 assess his or her "remaining capacities for work-related activities." SSR 96-8p, 1996 WL 374184 *2. A claimant's
 residual functional capacity ("RFC") assessment is used at step four of that process to determine whether he or she
 can do his or her past relevant work, and at step five to determine whether he or she can do other work. See id. It
 thus is what the claimant "can still do despite his or her limitations." Id. A claimant's RFC is the maximum amount
 of work the claimant is able to perform based on all of the relevant evidence in the record. See id. An inability to
 work, however, must result from his or her "physical or mental impairment(s)." Id. Thus, the ALJ must consider
 only those limitations and restrictions "attributable to medically determinable impairments." Id. In assessing a
 claimant's RFC, the ALJ also must discuss why "symptom-related functional limitations and restrictions . . . cannot
 reasonably be accepted as consistent with the medical or other evidence." Id. at *7.

1 interruptions from his mental health symptoms. See Tr. 806. On the other hand, again given that
 2 other medical opinion source evidence in the record contradict Dr. Pahlke's findings, it is unclear
 3 whether plaintiff should have been found disabled at step five.⁴

4 B. Dr. Velmer

5 In regard to the findings and opinions of Dr. Velmer referenced above, the ALJ found as
 6 follows:
 7

8 . . . Lolita Velmer, M.D., performed a consultative psychiatric examination of
 9 the claimant on June 21, 2003, diagnosing him with PTSD [posttraumatic
 10 stress disorder]. She opined he could perform simple, routine, repetitive
 11 work, some complex tasks, and even deal with the public, but suggested he
 12 might experience problems with attendance due to "intermittent disruptions"
 13 because of flare-ups of his PTSD. Curiously, she estimated his global
 14 assessment of functioning (GAF) to equal 35 to 40, which denotes a serious
 impairment in multiple areas of social and occupational functioning, and is
 entirely inconsistent with the rest of her report (Exhibit 8F). The undersigned
 accepts Dr. Velmer's diagnosis and will consider the limitations described in
 the body of her report, but must disregard her estimate of the claimant's GAF.
 . . .

15 Tr. 25-26. Plaintiff argues, and defendant appears to concede, that the ALJ erred when he failed
 16 to provide any specific reasons as to why Dr. Velmer's assessed GAF score and other functional
 17 limitations were "inconsistent with the rest of her report." See Embrey v. Bowen, 849 F.2d 418,
 18 421 (9th Cir. 1988) (insufficient for ALJ to reject opinion of treating or examining physician by
 19 merely stating, without more, that there is lack of objective medical findings in record to support
 20 that opinion).

21 The Court agrees the ALJ erred here, and, accordingly, agrees with plaintiff that because
 22

23 ⁴ If a claimant cannot perform his or her past relevant work, at step five of the disability evaluation process the ALJ
 24 must show there are a significant number of jobs in the national economy the claimant is able to do. See Tackett v.
 25 Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999); 20 C.F.R. § 404.1520(d), (e), § 416.920(d), (e). The ALJ can do this
 26 through the testimony of a vocational expert or by reference to the Commissioner's Medical-Vocational Guidelines
 (the "Grids"). See Tackett, 180 F.3d at 1100-1101; Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2000). At the
 hearing, the vocational expert testified that an individual who would miss two days of work per month would not be
 able to sustain competitive employment. See Tr. 901. Again, however, it is not clear that such a severe limitation is
 supported by the medical opinion source evidence in the record overall.

1 of this error, the ALJ's residual functional capacity assessment cannot be said to be reliable with
2 any reasonable certainty. Once more, though, the Court disagrees with plaintiff that a finding of
3 disability is warranted at step five in light of the vocational expert's testimony regarding missing
4 days of work, given the conflicting medical opinion source evidence in the record, including the
5 limitations assessed by Dr. Pahlke, which, as discussed above, were more severe, despite the low
6 GAF scores these two sources both gave.⁵

7
8 C. Dr. Hamill

9 Plaintiff next challenges the ALJ's evaluation of the medical evidence in the record from
10 his treating physician, John Hamill, M.D., which reads in relevant part:

11 On May 14, 2004, Dr. Hamill wrote a memorandum responding to an
12 unidentified party's request for a medical source statement, regarding the
13 claimant's allegations of PTSD, arthritis and heart disease. Dr. Hamill stated
14 [the] claimant did have PTSD but he was not getting psychiatric treatment.
15 He further described the results of [the] claimant's March 2002 cardiac
16 workup, which reflected a minimal (20%) lesion of one coronary artery with
17 excellent heart function [he likely meant the claimant's left ventricular
18 ejection fraction] of about 72%. Dr. Hamill opined [the] claimant's
19 intermittent symptoms of angina – which respond well to nitroglycerine –
20 would not be disabling. Finally, he discussed [the] claimant's "general
21 arthritis". He wrote that [the] claimant reported significant disability from
22 this, and that he had seen the claimant shopping in local stores using a "cart".
23 On the other hand, Dr. Hamill described the objective medical evidence as
24 pointing to "minimal degenerative disc disease", which was inconsistent with
25 the claimant's complaints of pain. Finally, he noted episodes of tendonitis and
26 epicondylitis, which responded well to steroids, and an episode of peroneal
palsy which has resolved. Dr. Hamill did not provide a detailed residual
functional capacity estimate, but did note the claimant walked with some
apparent difficulty, and described his mental state as "a slow progressive
decline" with "a continued perception of disability" (Exhibit 16F: 5, 6). On
January 25, 2005, Dr. Hamill opined he did not think the claimant would be
able to return to work in "any sort of manual labor capacity". He further

⁵ It also should be noted that while Dr. Velmer did state that "regular work attendance might not be successful" and that one of plaintiff's problems was "regular attendance and maintaining regular hours at work," she did not actually opine that plaintiff would miss any work, or, if he did, that he would miss at least two days per month. Tr. 322. As such, again it is not clear the vocational expert's testimony regarding ability to maintain competitive employment if this amount of work were missed each month is supported by the substantial evidence in the record.

1 opined [the] claimant “should be able to work in a sedentary capacity” and
2 recommended retraining (Exhibit 22F: 49).

3 Dr. Hamill completed a Physical Capacities Evaluation form, provided by
4 [the] claimant’s representative, on February 8, 2007. He opined [the] claimant
5 retained the residual functional capacity to lift and carry up to ten pounds
6 occasionally and up to twenty pounds rarely. He further opined that during an
7 eight-hour day, [the] claimant could sit for two hours at a time for up to eight
8 hours; and could stand or walk for up to thirty minutes at a time for a
9 maximum of [sic] hour. Alternatively, Dr. Hamill opined [the] claimant could
10 periodically alternate sitting and standing thirty minutes at a time for up to
11 two hours during an eight-hour day. He wrote that [the] claimant should
12 never bend, squat, crawl or climb, and was limited to only occasional
13 overhead reaching. Lastly, Dr. Hamill opined [the] claimant would likely
14 miss up to four days of work per month because of his pain and the fact that
15 his “wife is often sick” (Exhibit 22F).

16 As a treating medical source, Dr. Hamill’s opinions deserve serious
17 consideration, because he has personally examined the claimant and has
18 followed the course of the claimant’s medical condition over a period of time.
19 However, it is clear that Dr. Hamill relied quite heavily on the subjective
20 report of symptoms and limitations provided by the claimant, and seemed to
21 uncritically accept as true most, if not all, of what the claimant reported. In
22 the remarks section of the form he completed in February 2007 he wrote that
23 “overall [the claimant] has been insistent for years in his report of pain and my
24 observation of his function both in and out of the office”. In fact, Dr. Hamill
25 had occasionally seen the claimant using two canes or a scooter while
26 shopping. He also described his observations of the claimant’s pain behavior
in the office. Yet he also commented on several occasions how the claimant’s
complaints were not consistent with his objective medical findings (an
observation made by several other doctors), and reported that his staff had
observed the claimant in town walking easily and without distress. As
explained elsewhere in this decision, there exist good reasons for questioning
the reliability of the claimant’s subjective complaints. Likewise, this marked
change in Dr. Hamill’s opinion – in the absence of any documented decline in
the claimant’s condition – suggests he may have inadvertently stepped out of
his role as an objective treating medical source and assumed the role of
advocate. The possibility always exists that a doctor may express an opinion
in an effort to assist a patient with whom he or she sympathizes for one reason
or another. Another reality that should be mentioned is that patients can be
quite insistent and demanding in seeking supportive notes or reports from
their physicians, who might provide such a note in order to satisfy their
patient’s requests and avoid unnecessary doctor/patient tension. While it is
difficult to confirm the presence of such motives, they are more likely in
situations where the opinion in question departs substantially from the rest of
the evidence of record, as in the current case.

1 Finally, Dr. Hamill merely completed a “fill-in-the-blanks” form and did not
2 provide objective evidence to substantiate his opinion or even explain how
3 [the] claimant’s impairments limited his ability to lift and carry, to sit, stand
4 and walk, to perform postural or manipulative tasks or to fulfill the basic
5 mental demands of competitive, remunerative, unskilled work. The difficulty
6 with this type of attorney-created, goal directed, check-the-box, fill-in-the-
blank form is that while signed by a treating medical source, it contains no
real description of medical findings and is merely brief and conclusory in
form. . . .

7 Tr. 26-27.

8 Plaintiff argues the ALJ erred in ignoring Dr. Hamill’s 2004 opinion regarding his need
9 to rest secondary to his angina. See Tr. 359 (“[Plaintiff’s angina] is reasonably expected to occur
10 three or four times a month and require an hour to rest at a time.”). While it is true that the ALJ
11 did not address this limitation specifically, the Court finds any error in this regard to be harmless,
12 because, as noted by the ALJ above, Dr. Hamill subsequently opined in late January 2005, that
13 plaintiff “should be able to work a sedentary” job. Tr. 615. Dr. Hamill, however, failed to note
14 any issue plaintiff had with respect to needing to rest due to angina. In other words, nothing in
15 that later treatment record indicated Dr. Hamill still felt plaintiff required such rest. See Stout v.
16 Commissioner, Social Sec. Admin., 454 F.3d 1050, 1055 (9th Cir. 2006) (error harmless where
17 non-prejudicial to claimant or irrelevant to ALJ’s ultimate disability conclusion).
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19
20 Plaintiff also challenges the ALJ’s rejection of Dr. Hamill’s most recent medical source
21 opinion on the basis of lack of objective medical support in the record, pointing to evidence of
22 significant degenerative joint disease and other similar findings. But the mere existence of an
23 impairment, such as degenerative joint disease in this case, is insufficient to establish significant,
24 let alone disabling, work-related limitations, unless the objective findings indicating the presence
25 of that impairment relates directly to such limitations. That is, just because a claimant may have
26 an underlying physical impairment does not mean he or she has any actual functional limitations

1 stemming therefrom. See Matthews v. Shalala, 10 F.3d 678, 680 (9th Cir. 1993). Here, though,
2 Dr. Hamill made no such direct connection – or even mentioned any specific objective findings
3 of degenerative joint disease or other diagnosed medical impairment – in the physical capacities
4 evaluation he completed. See Tr. 567-68.

5 Plaintiff's argues the ALJ incorrectly found Dr. Hamill's physical capacities evaluation
6 findings to be inconsistent with the rest of the medical record regarding his physical impairments
7 and limitations, noting David Deutsch, M.D., a non-examining, consulting physician, had limited
8 him to performing only sedentary work as well. But the limitations found by Dr. Deutsch were
9 assessed in early March 1999, well before the relevant time period in this case. See Tr. 282-89.
10 That is because while plaintiff, as noted above, originally alleged an onset date of disability of
11 January 1, 1999, he amended that date at the hearing to January 1, 2002. See Tr. 18, 864-65. In
12 addition, there is nothing in the assessment form Dr. Deutsch completed to indicate his findings
13 concerned any period of time other than the current one.
14

15
16 Lastly, it should be noted that the ALJ provided two additional valid reasons for rejecting
17 Dr. Hamill's most recent assessed limitations. As noted above, the ALJ pointed out that Dr.
18 Hamill "relied quite heavily on the subjective report of symptoms and limitations provided by"
19 plaintiff, and, as discussed below, the ALJ properly discounted plaintiff's credibility. Tr. 27; see
20 also Tonapetyan, 242 F.3d at 1149 (medical opinion premised on claimant's complaints where
21 record supports ALJ in discounting claimant's credibility may be disregarded); see also Morgan
22 v. Commissioner of the Social Sec. Admin., 169 F.3d 595, 601 (9th Cir. 1999) (same). Further,
23 the ALJ correctly noted that the physical capacities evaluation report completed by Dr. Hamill
24 was on a check-the-box form. Murray v. Heckler, 722 F.2d 499, 501 (9th Cir.1983) (expressing
25 preference for individualized medical opinions over check-off reports). Accordingly, the Court
26

1 further rejects plaintiff's argument that he should have been found disabled at step five based on
2 the evidence provided by Dr. Hamill contained in the record.

3 II. The ALJ's Assessment of Plaintiff's Credibility

4 Questions of credibility are solely within the control of the ALJ. See Sample v.
5 Schweiker, 694 F.2d 639, 642 (9th Cir. 1982). The Court should not "second-guess" this
6 credibility determination. Allen, 749 F.2d at 580. The Court also may not reverse a credibility
7 determination where that determination is based on contradictory or ambiguous evidence. See id.
8 at 579. In addition, that some of the reasons for discrediting a claimant's testimony should
9 properly be discounted does not render the ALJ's determination invalid, as long as that
10 determination is supported by substantial evidence. See Tonapetyan v. Halter, 242 F.3d 1144,
11 1148 (9th Cir. 2001).

13 To reject a claimant's subjective complaints, the ALJ must provide "specific, cogent
14 reasons for the disbelief." Lester, 81 F.3d at 834 (citation omitted). The ALJ "must identify what
15 testimony is not credible and what evidence undermines the claimant's complaints." Id.; see also
16 Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993). Unless affirmative evidence shows the
17 claimant is malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear
18 and convincing." Lester, 81 F.2d at 834. The evidence as a whole must support a finding of
19 malingering. See O'Donnell v. Barnhart, 318 F.3d 811, 818 (8th Cir. 2003).

21 In determining a claimant's credibility, the ALJ may consider "ordinary techniques of
22 credibility evaluation," such as reputation for lying, prior inconsistent statements concerning
23 symptoms, and other testimony that "appears less than candid." Smolen v. Chater, 80 F.3d 1273,
24 1284 (9th Cir. 1996). The ALJ also may consider a claimant's work record and observations of
25 physicians and other third parties regarding the nature, onset, duration, and frequency of
26

1 symptoms. See id.

2 In this case, the ALJ discounted plaintiff's credibility in part on the basis that his alleged
3 symptoms "are only partially supported by" the medical evidence in the record. Tr. 24. This is a
4 valid basis upon which to discount a claimant's credibility. See Regennitter v. Commissioner of
5 SSA, 166 F.3d 1294, 1297 (9th Cir. 1998). As noted above, the ALJ did not err in rejecting the
6 objective medical evidence in the record indicating plaintiff had more severe physical functional
7 limitations than those contained in the ALJ's RFC assessment. See Tr. 22 (residual functional
8 capacity to lift and carry 50 pounds occasionally and 25 pounds frequently, and to sit, stand and
9 walk for up to eight hours in eight-hour workday).

11 The ALJ next discounted plaintiff's credibility in part because the treatment he received
12 "for his allegedly disabling symptoms" was "essentially routine and/or conservative in nature,"
13 and had been "generally successful in controlling those symptoms." Tr. 24; see Meanal v. Apfel,
14 172 F.3d 1111, 1114 (9th Cir. 1999) (ALJ properly considered physician's failure to prescribe,
15 and claimant's failure to request serious medical treatment for supposedly excruciating pain);
16 Johnson v. Shalala, 60 F.3d 1428, 1434 (9th Cir. 1995) (ALJ properly found prescription of
17 physician for conservative treatment only to be suggestive of lower level of pain and functional
18 limitation); see also Morgan, 169 F.3d 595, 599 (9th Cir. 1999) (ALJ may discount claimant's
19 credibility on basis of medical improvement); Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir.
20 1998) (same). Plaintiff argues this shows the ALJ misunderstood that conservative treatment is
21 generally employed to treat degenerative disc disease. See (ECF #15, p. 13 (citing Glomski v.
22 Massanari, 172 F.Supp.2d 1079, 1085 (E.D. Wis. 2001))).

25 In Glomski, the district court stated that the ALJ's "discussion of non-operability and
26 conservative therapies" may have indicated "a misunderstanding of degenerative disc disease,"

1 which the court went on to comment was “generally treated with conservative therapy and only”
2 resulted “in an operation in 2% of its sufferers.” Id. (citing Scientific American at 53 (August
3 1999)). It is unclear, however, exactly what evidence the Scientific American article the district
4 court cited – which, it also should be noted, is from 1999 – is based on, or the objective medical
5 evidence behind its findings. That is, this Court lacks sufficient expertise in the appropriate field
6 to make that determination itself. Nor does the Court find the fact that degenerative disc disease
7 may “generally” be treated conservatively, necessarily mean such is the case here, particularly as
8 there is nothing to indicate any of plaintiff’s own treatment providers, or any of the other medical
9 sources in the record, necessarily believed that to be the case.
10

11 Accordingly, the Court finds the district court’s statement on the matter in Glomski to be
12 unpersuasive, and therefore declines to adopt or follow it, given that, as noted above, the Ninth
13 Circuit has recognized that evidence of a lack of more serious medical treatment may be used as
14 a proper basis for discounting claimant credibility. The ALJ discounted plaintiff’s credibility as
15 well for the following reasons:
16

17 . . . [A]lthough the claimant has described daily activities that are fairly
18 limited, three factors weigh against considering these allegations to be strong
19 evidence in favor of finding the claimant disabled. First, allegedly limited
20 daily activities cannot be objectively verified with any reasonable degree of
21 certainty. Second, even if the claimant’s daily activities are truly as limited as
22 alleged, it is difficult to attribute that degree of limitation to his medical
23 condition, as opposed to other reasons, in view of the relatively weak medical
24 evidence and other factors discussed in this decision. Finally, the record
25 reflects that [the] claimant has engaged in daily activities that are not limited
26 to the extent one would expect, given the complaints of disabling symptoms
and limitations. For example, the claimant has reported to his treating medical
sources since his alleged onset date that he does woodworking and crossword
puzzles, watches television and enjoys bicycling. He also testified at the
hearing he continues to bicycle for exercise up to eight blocks at a time and
occasionally mows his front and back lawns. Finally, despite his allegations
of symptoms and limitations preventing all work, the record reflects that [the]
claimant has traveled out of state in a pickup truck to Wyoming since the
alleged onset date. These activities tend to reflect that the claimant’s daily

1 activities have, at least at times, been somewhat greater than [the] claimant
2 has generally reported, and suggest that he may still be capable of performing
3 the basic demands of competitive, remunerative, unskilled work on a
4 sustained basis. . . .

5 Tr. 24-25. Plaintiff argues the ALJ erred here by failing to making any finding that his activities
6 of daily living consumed a substantial part of his day or that they could be easily transferred to a
7 work environment.

8 To determine whether a claimant's symptom testimony is credible, the ALJ may consider
9 his or her daily activities. See Smolen, 80 F.3d at 1284. Such testimony may be rejected if the
10 claimant "is able to spend a substantial part of his or her day performing household chores or
11 other activities that are transferable to a work setting." Id. at 1284 n.7. The claimant need not be
12 "utterly incapacitated" to be eligible for disability benefits, however, and "many home activities
13 may not be easily transferable to a work environment." Id. The Court agrees that the record fails
14 to show plaintiff engaged in the above cited activities for a substantial part of his day or that they
15 are necessarily transferrable to a work setting.

16 On the other hand, as noted above, the ALJ also is permitted to consider other "ordinary
17 techniques of credibility evaluation," such as prior inconsistent statements, other testimony that
18 "appears less than candid" and the observations of physicians and other third parties regarding
19 the nature, onset, duration and frequency of the claimant's symptoms. Smolen, 80 F.3d at 1284.
20 To that extent, the Court finds the ALJ was not necessarily remiss in finding, for example, that
21 plaintiff's ability to ride his bicycle and enjoy doing so, mow his lawn and do woodworking and
22 crossword puzzles, reflects an ability to engage in daily activities, which "are not limited to the
23 extent one would expect, given the complaints of disabling symptoms and limitations." Tr. 24.
24 In addition, also as noted by the ALJ, Dr. Hamill's staff had observed plaintiff "in town walking
25 easily and without distress." Tr. 27; see also Tr. 403 (reporting staff member had spotted plaintiff
26

1 “trucking along” at “good clip” in no acute distress while walking across bridges in town).

2 Lastly, the ALJ discounted plaintiff’s credibility in part for the following reasons:

3 . . . [T]he claimant’s responses while testifying were evasive or vague at
 4 times, and left the impression he may have been less than entirely candid. He
 5 also tended to minimize his activities of daily living (i.e., work around the
 6 house and how long he had been riding a bicycle), and exaggerated the
 7 number of times he experienced heart problems. This behavior may not have
 8 been the result of a conscious intention to fabricate or to mislead.
 9 Nevertheless it suggests the information provided by [the] claimant may not
 10 be entirely reliable.

11 Tr. 25. Plaintiff has not challenged this basis for the ALJ’s adverse credibility determination. In
 12 addition, an ALJ may rely on a claimant’s demeanor at the hearing as a basis for discrediting his
 13 or her testimony. See Thomas v. Barnhart, 278 F.3d 947, 960 (9th Cir. 2002); see also Matney v.
 14 Sullivan, 981 F.2d 1016, 1020 (9th Cir. 1992). Further, inclusion of personal observations of the
 15 claimant in the ALJ’s findings “does not render the decision improper,” as long as the ALJ does
 16 not reject the claimant’s subjective complaints “solely on the basis of” such observations. Nyman
 17 v. Heckler, 779 F.2d 528, 531 (9th Cir. 1986); SSR 95-5p, 1995 WL 670415 *2. Since the ALJ
 18 did provide other, valid bases for discounting plaintiff’s credibility here as discussed above, the
 19 ALJ did not error in discounting it for this reason as well.

20 III. The ALJ’s Evaluation of the Lay Witness Evidence in the Record

21 Lay testimony regarding a claimant’s symptoms “is competent evidence that an ALJ must
 22 take into account,” unless the ALJ “expressly determines to disregard such testimony and gives
 23 reasons germane to each witness for doing so.” Lewis v. Apfel, 236 F.3d 503, 511 (9th Cir.
 24 2001). In rejecting lay testimony, the ALJ need not cite the specific record as long as “arguably
 25 germane reasons” for dismissing the testimony are noted, even though the ALJ does “not clearly
 26 link his determination to those reasons,” and substantial evidence supports the ALJ’s decision.
Id. at 512. The ALJ also may “draw inferences logically flowing from the evidence.” Sample,

1 694 F.2d at 642.

2 As noted by plaintiff, the record contains lay witness statements from plaintiff's friends
3 and family detailing their observations of his symptoms and limitations. See Tr. 143-47, 228-31.

4 In regard to those statements, the ALJ stated that:

5 The undersigned also considered the written statements submitted by his
6 witnesses. There is no reason to doubt their observations of the behaviors the
7 claimant demonstrates, and the undersigned finds them to be generally
8 credible. However, as they do not have medical and/or vocational expertise,
9 their opinions are of limited value in establishing [the] claimant's residual
10 functional capacity, or determining how the claimant's impairments affect his
overall ability to perform basic work activities. Therefore, the undersigned
cannot afford their testimony significant weight as additive evidence to
support a finding of disability.

11 Tr. 25. Both parties agree the ALJ failed to provide adequate reasons for rejecting the statements
12 of the above lay witnesses. Indeed, as noted above, the Ninth Circuit expressly has held that lay
13 witness testimony "is competent evidence that an ALJ must take into account." Lewis, 236 F.3d
14 at 511. While it may be true, furthermore, that lay witnesses are not qualified to give opinions
15 on the ultimate issue of disability, the Ninth Circuit also has expressly held that the ALJ must
16 consider the "observations by non-medical sources as to how an impairment affects a claimant's
17 ability to work." Sprague v. Bowen, 812 F.2d 1226, 1232 (9th Cir. 1987) ("Descriptions by
18 friends and family members in a position to observe a claimant's symptoms and daily activities
19 have routinely been treated as competent evidence."). Accordingly, the Court also finds the ALJ
20 erred in his evaluation of the lay witness evidence in the record.

21
22
23 IV. The ALJ's Step Four Determination

24 As noted above, the ALJ found plaintiff could return to her past relevant work, which did
25 not require the ability to perform work-related activities precluded by his residual functional
26 capacity. See Tr. 29. Also as noted above, plaintiff argues that the ALJ's finding at step four of

1 the sequential disability evaluation process here, should be reversed in light of the evidence in
2 the record supporting a determination of disability at both step three and step five. Plaintiff has
3 the burden at step four of the disability evaluation process to show he is incapable of returning to
4 his past relevant work. See Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999). The Court
5 agrees the ALJ's step four determination is not clearly supported by substantial evidence, given
6 the ALJ's errors in evaluating the medical evidence in the record concerning plaintiff's mental
7 impairments and limitations, in evaluating the lay witness evidence in the record and in assessing
8 plaintiff's residual functional capacity.
9

10 V. Remand for Further Administrative Proceedings Is Appropriate

11 The Court may remand this case "either for additional evidence and findings or to award
12 benefits." Smolen, 80 F.3d at 1292. Generally, when the Court reverses an ALJ's decision, "the
13 proper course, except in rare circumstances, is to remand to the agency for additional
14 investigation or explanation." Benecke v. Barnhart, 379 F.3d 587, 595 (9th Cir. 2004) (citations
15 omitted). Thus, it is "the unusual case in which it is clear from the record that the claimant is
16 unable to perform gainful employment in the national economy," that "remand for an immediate
17 award of benefits is appropriate." Id.
18

19 Benefits may be awarded where "the record has been fully developed" and "further
20 administrative proceedings would serve no useful purpose." Smolen, 80 F.3d at 1292; Holohan
21 v. Massanari, 246 F.3d 1195, 1210 (9th Cir. 2001). Specifically, benefits should be awarded
22 where:
23

24 (1) the ALJ has failed to provide legally sufficient reasons for rejecting [the
25 claimant's] evidence, (2) there are no outstanding issues that must be resolved
26 before a determination of disability can be made, and (3) it is clear from the
record that the ALJ would be required to find the claimant disabled were such
evidence credited.

1 Smolen, 80 F.3d 1273 at 1292; McCartey v. Massanari, 298 F.3d 1072, 1076-77 (9th Cir. 2002).
2 Because issues remain with respect to the medical evidence in the record concerning plaintiff's
3 mental impairments and limitations, the lay witness statements from his friends and family and
4 plaintiff's residual functional capacity, it is appropriate to remand this matter to defendant for the
5 purpose of conducting further administrative proceedings.

6
7 Plaintiff argues the medical opinion source evidence the ALJ erred in evaluating must be
8 credited as true. It is true that where the ALJ has failed "to provide adequate reasons for
9 rejecting the opinion of a treating or examining physician," that opinion generally is credited "as
10 a matter of law." Lester, 81 F.3d at 834 (citation omitted). But where the ALJ is not required to
11 find the claimant disabled on the crediting of evidence, this constitutes an outstanding issue that
12 must be resolved, and therefore the Smolen test will not be found to have been met. See Bunnell
13 v. Barnhart, 336 F.3d 1112, 1116 (9th Cir. 2003). In addition, "[i]n cases where the vocational
14 expert has failed to address a claimant's limitations as established by improperly discredited
15 evidence," the Ninth Circuit "consistently [has] remanded for further proceedings rather than
16 payment of benefits." Bunnell, 336 F.3d at 1116. As discussed above, it is not exactly clear what
17 plaintiff's residual functional capacity should be or whether he can perform his past relevant
18 work or other jobs existing in significant numbers in the national economy, in light of the ALJ's
19 errors addressed above. As such, applying the credit as true rule to the improperly evaluated
20 medical opinion evidence would not be appropriate in this case.

21
22
23 It is also true as noted by plaintiff that where lay witness evidence is improperly rejected,
24 that evidence may be credited as a matter of law as well. See Schneider v. Barnhart, 223 F.3d
25 968, 976 (9th Cir. 2000) (when lay witness evidence rejected by ALJ was given effect required
26 by federal regulations, it became clear that claimant's limitations were sufficient to meet or equal

1 listed impairment). As noted by the Ninth Circuit, though, courts do have “some flexibility” in
2 how they apply the “credit as true” rule. Connett v. Barnhart, 340 F.3d 871, 876 (9th Cir. 2003).
3 Further, Schneider dealt with the situation where defendant had failed to cite any evidence to
4 contradict the statements of five lay witnesses regarding the claimant’s disabling impairments.
5 223 F.3d at 976. Such is not the case here. Accordingly, again the Court declines to apply the
6 credit as true rule to the lay witness evidence in the record.
7

8 CONCLUSION

9 Based on the foregoing discussion, the Court finds the ALJ improperly determined
10 plaintiff to be not disabled. Accordingly, the ALJ’s decision hereby is REVERSED and
11 REMANDED for further administrative proceedings in accordance with the findings contained
12 herein. Plaintiff requests that on remand defendant be ordered to complete the administrative
13 proceedings and issue a new decision within 90 days, or be subject to an entry of judgment on
14 the merits in plaintiff’s favor. The Court, however, finds no valid basis for doing so, and thus it
15 declines to grant plaintiff’s request here.
16

17 DATED this 22nd day of December, 2010.
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19

20 
21 Karen L. Strombom
22 United States Magistrate Judge
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25
26